NO. 21153

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS SANDERS, et al.,

Appellants,

vs.

JOHN ERRECA, et al.,

Appellees.

APPELLANTS' OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FADEM, BROWN AND KANNER
By: GIDEON KANNER
5455 Wilshire Boulevard
Los Angeles, California 90036

Attorneys for Appellants

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Attorneys for Appellants

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INTRODUCTORY STATEMENT

The case at bench is an action for damages brought individually against members of the California Highway Commission, the Director of the California Department of Public Works, and a Senior Right of Way Agent of the California Division of Highways.

Appellants herein, Plaintiffs below, have brought their action in the U. S. District Court to secure redress for deprivation of Appellants' property rights protected by the U. S. Constitution. Such rights of the Appellants were impaired when the Defendants, acting under color of their office, engaged in a course of action whereby the Appellants were forced to discontinue construction of a new shopping center, purportedly because the California Depart-

ment of Public Works was about to take Appellants' land for a freeway. In fact, no taking such as described to Appellants was ever intended or ever took place. The taking, when it came a year later under the prod of this action, proved to be substantially different. By reason of the misrepresentation as to the nature of the taking, threats by Appellees, and the delay, Appellants unnecessarily suffered massive damages.

JURISDICTIONAL STATEMENT

This Court's jurisdiction of the instant appeal is based on 28 U.S.C. §1291 and 28 U.S.C. §1294.

The jurisdiction of the District Court comes from 28 U.S.C. §1331 and 28 U.S.C. §1343.

STATEMENT OF THE CASE

The factual allegations contained in the Amended Complaint herein (CT 29) 1/ are briefly as follows:

The Appellants herein, Plaintiffs below, are the owners of a parcel of land of about 4.78 acres located within the city limits of Los Angeles, in the San Fernando Valley. The property has in the past been used as a shopping center.

Appellants have commenced a project whereby the subject

1/ CT designates Clerk's Transcript; RT the Reporter's Transcript.

property would be converted into a new, modern and larger shopping center. To this end Appellants subdivided, obtained the necessary bonds and permits, and employed the services of architects, engineers, contractors, lawyers and surveyors for the purpose of planning, designing and constructing the new shopping center. Tenants for the new shopping center were obtained, including Crocker Citizens National Bank, and leases signed. Old tenants moved out to make way for the construction.

In March 1965, after all of that was done at the cost of tens of thousands of dollars, and contracts were let, additional liabilities incurred and construction started, Appellants were contacted by Appellee Pierson Pedley, a Senior Right of Way Agent for the California Division of Highways. Pedley informed Appellants that their property was about to be taken by eminent domain for a freeway. Pedley stated that if Appellants did not cease construction of their new shopping center, the State of California would immediately start litigation and force Appellants to stop construction. In fact, the State could not then bring any action as no condemnation resolution had been passed, which Pedley knew, but this was unknown to Appellants.

In May 1965, Appellees Bradford, Guthrie, Houghteling, Woolley, Whitehurst, Kofman and Payne, members of the California Highway Commission, passed condemnation Resolution No. C-7011 purporting to authorize the condemnation of all the subject property. In fact, notwithstanding such resolution, Appellee Erreca, Director of the Department of Public Works, failed to

cause any condemnation proceedings to be undertaken.

In January 1966, after almost a year had passed since the initial interference by Pedley with the Appellants' shopping center construction, and no condemnation had occurred nor any bona fide steps taken to acquire the subject property by purchase, Appellants brought the instant action in the U. S. District Court, Southern District of California, Central Division, seeking damages from the Appellees for the above described interference with Appellants' use and enjoyment of their property.

Appellees moved to dismiss the action (CT 9). The motion was heard on February 28, 1966, before the Honorable Charles H. Carr, U. S. District Judge, who granted the motion (RT 35), and made and entered an order (CT 97) dismissing the action.

Thereafter, Appellants moved for a new trial (CT 100) on the grounds of newly discovered evidence consisting of the passage of a new condemnation resolution substantially reducing the area of taking of the subject property, and of admission by means of a signed, published statement of Appellee Houghteling that Appellees do not in fact exercise any discretionary functions as to passage of condemnation resolutions. The motion for a new trial was denied (CT 198).

This appeal from the dismissal of the action in the District Court followed.

QUESTIONS PRESENTED

1. Are Federal Courts powerless to entertain lawsuits for violation of the Plaintiffs' Federal Constitutional rights, against a state official or employee individually, regardless of the merits of the case?

2. Where a defendant state official or employee claims immunity from suit in Federal Court, on the grounds that his acts complained of are claimed to be within his discretion, can such claim of immunity be sustained without any inquiry as to whether or not such acts are in fact discretionary?

3. Where state officials exact from a property owner a cessation of lawful construction of a shopping center by fraudulent threats of litigation and false promises of cooperation if construction is ceased, and where the owner as a result of the threats and in reliance on the promises ceases such construction and suffers severe economic damages thereby, has the owner been deprived of his property rights secured by the Constitution, within the meaning of 42 U.S.C. §1983?

SPECIFICATION OF ERRORS

The District Court erred in that :

1. It held (CT 98) that the Defendants herein are immune from lawsuit in Federal Courts merely by virtue of their status as officials or employees of the State of California.

2. It found that the defendants herein were acting within the scope of their discretion when they committed the acts complained of, although there has been neither evidence nor any other showing as to what the defendants' functions are or what is the discretion involved therein, if any. Indeed, there was a showing, upon Motion for New Trial (CT 100) by the written admission of one of the defendants, that defendants Bradford, Guthrie, Houghteling, Woolley, Whitehurst, Kofman and Payne in fact exercise no discretionary function as to adoption of condemnation resolutions.

3. It based its denial of relief to Appellants on the basis that the Fourteenth Amendment and the Civil Rights Act (42 U.S.C. §1983) afford relief only to Negroes and no one else (see RT 14, 32).

4. It found (CT 98) that the acts complained of and the damages caused thereby do not constitute a taking or damaging of property within the protection afforded by the United States Constitution. The correct test of applicability of the Fourteenth Amendment is whether there has been a deprivation of a property right without due process of law.

ARGUMENT

I

INTRODUCTION

"The King, moreover," - said Blackstone - "is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness." (Blackstone, Commentaries, 246 [17th edition, 1830]; emphasis Blackstone's).

The Defendants are a Right of Way Agent and Highway Commissioners, not Kings. It is at best doubtful if Blackstone's view prevails even in the Constitutional Monarchy now extant in the nation in which he wrote. In days when some clergy dare question God's divinity, it seems anachronistic to urge that a highway agent has inherited the divine right of Henry VIII. 2/

The Defendants, unlike Blackstone's idealized King, can and have done wrong - they have wrongfully interferred with Appellants' property rights to Appellants' damage. The instant case seeks to determine, on the merits, the extent of the damages inflicted on Appellants.

But, it has been the assertion of the Appellees in the court below that they are immune from the exercise of the judicial power of the United States, because they are state officials and employees.

2/ "Possibly it was during Tudor despotism when much nonsense about the immaculate king of transcendental prerogatives and goodness was purveyed." Borchard, 36 Yale L. J. 31.

In other words, appellees seek to arrogate to themselves the kind of absolute immunity from judicial review as was once possessed by absolute monarchs, and is today possessed only by some sovereign states. 3/

It is most important to emphasize at this point that what the Appellees seek to accomplish in the case at bench, is the establishment of a privileged class - state government employees - who cannot be held accountable for their acts, and whose misdeeds, no matter how wrongful and damaging, are beyond the reach of our judicial system. This, we submit is the most crucial issue raised by the instant case.

The supreme law of the land is the United States Constitution. It is expressly decreed to be such by its language (Article VI, clause 2). But if state employees can violate the rights secured by the Constitution and then escape accountability for such violations, not on the merits, but merely because they are state employees, then the will of state employees becomes "the supreme law of the land", and not the Constitution.

Such a conclusion is intolerable. Such doctrine has been repeatedly and consistently rejected by the U. S. Supreme Court and other Federal Courts. We ask this Court to reject it again. To borrow an expression of Mr. Justice Brandeis: against that pernicious doctrine this court should resolutely set its face.

3/ In this connection please note that the State of California no longer enjoys immunity from lawsuit in the State courts. See p. 10, infra.

II

EMPLOYMENT BY THE STATE GOVERNMENT DOES NOT RENDER ONE IMMUNE TO THE JUDICIAL POWER OF THE UNITED STATES.

The essence of the Appellees' argument is that notwithstanding the provisions of Article III, §§ 1 and 2, of the United States Constitution, establishing the judicial power of the United States, the Appellees are somehow totally beyond the reach of the Federal Courts. This result the Appellees seek to achieve solely by virtue of the fact that they are employees or officials of a state.

The above arguments by the Appellees are devoid of merit.

The only conceivable way in which such an immunity argument can be made, is that the immunity is somehow bestowed by the state upon its employees, for it cannot be contended that the Appellees are inherently immune; the immunity must spring from the state-defendant relationship.

The theory that a state may bestow immunity falls apart when subjected to legal analysis for two reasons. First, as shown below, the State of California itself possesses no immunity from lawsuit. Second, even in the old days, when California did possess immunity from lawsuit, such immunity did not extend to state employees. A fortiori, no such immunity of employees can exist now when the state from whom the employees would have to derive their immunity itself possesses none. Finally, assuming arguendo that the state does confer some form of immunity or privilege upon its employees in the state courts - which in fact is not the case - such a state-conferred immunity vanishes in the

face of the judicial power of the United States.

The above points are more fully discussed below.

A. California State Officials Lack Immunity From Lawsuit Even Under State Law.

Article XX, §6 of the California Constitution provides that the state is subject to lawsuit. In Muskopf v. Corning Hospital District (1961), 55 Cal. 2d 211, 359 P. 2d 457, the California Supreme Court construed the above provision of the State Constitution so as to abolish state immunity from lawsuit. In a companion case to Muskopf (Lipman v. Brisbane Elementary School District [1961], 55 Cal. 2d 224, 234, 359 P. 2d 465), the California Supreme Court held that state officials are amenable to lawsuit when they engage in tortious conduct.

The latter case, of course, merely reiterated long-standing California law:

> "The civil liability of an officer committing a tort appears to be exactly the same as that of a civilian." Silva v. MacAuley (1933), 135 Cal. App. 249, 257, 26 P. 2d 887, Petition for hearing denied by Supreme Court.

Also see: Wolfsen v. Wheeler (1933), 130 Cal. App. 475, 19 P. 2d 1004.

> " 'Generally, the applicable rule is that an action against state officers, . . . [to] obtain relief from an alleged invalid act or abuse of authority by

them is not ordinarily a suit against the state, and is not prohibited as such under the general principles governing the immunity of the state from suit. That is true because acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state. (Citations)' "

Ahlgren v. Carr (1962), 209 Cal. App. 2d 248, 254-255.

We cite the above law to demonstrate that even under Appellees' theory they enjoy no immunity from lawsuit. For such a claimed immunity could only exist as derivative from the state, and it is clear from the above that neither the State of California itself, nor its employees are protected by state law from accountability before the courts for their individual wrongs. In short, Appellees cannot acquire from the state something which the state itself does not possess.

B. The State Lacks Power to Immunize Its Employees From the Judicial Power of The United States.

Even if one could arguendo disregard the law that state employees cannot derive any immunity from their connection with the State of California, and somehow assume that the state does confer such immunity, the state employees would still be liable in actions brought in federal courts. By reason of the federal sup-

remacy clause of the Constitution (Article VI) the State simply lacks the power to immunize its employees from the application of the judicial power of the United States. As this Court recently put it:

> "Whether there is 'color' of state law is a federal and not a state question. Were this not true a state acting through its legislature or courts, would have within its power to immunize its agencies and officials from liability under the Civil Rights Act." Marshall v. Sawyer (1962), 301 F. 2d 639, 646.

The same conclusion was reached by the U. S. Court of Appeals, Third Circuit, in Picking v. Pennsylvania R. R. Co. (1945), 151 F. 2d 240, cert. denied 332 U.S. 776, rehearing denied 332 U.S. 821:

> "Obviously if a state statute purports to confer immunity upon an official of a state who has violated the provisions of the Third Civil Rights Act by depriving an individual of a federal right, the state has invaded the liberties of the individual which are projected by the 14th Amendment." (151 F. 2d at 251-252).

Likewise the U. S. Supreme Court:

> "It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. Monroe v. Pape, supra, (365 U.S. at 171-187). Such claims are

entitled to be adjudicated in federal courts. (Citations)." McNeese v. Board of Education (1963), 373 U.S. 668,674.

"It is familiar doctrine that the prohibition of a federal statute may not be set at naught or its benefit denied by state statutes or common law rules." Sola Electric Co. v. Jefferson Electric Co. (1942), 317 U.S. 173, 176.

In short, any claim of personal immunity derivative from the authority of a state, cannot bind or limit the judicial power of the United States entrusted to the Federal Courts.

C. The United States Supreme Court Has On Many Occasions Rejected Claims Of Immunity By State Officials.

Starting with the first impression case (Osborn v. Bank of the United States [1824], 9 Wheat. 738) the United States Supreme Court has on over a score of occasions held that state officials sued individually for their wrongful acts lack immunity and are amenable to suit in Federal Courts.

The rationale of such U. S. Supreme Court holdings is two-fold. First, a state is not a physical thing, it is a conceptual abstraction. Therefore, a state can act only through individuals. Hence, to lay a prohibition on certain state actions by means of the Fourteenth Amendment, while allowing state officials to freely

transgress such prohibition, would be to render the Fourteenth Amendment and other portions of the U. S. Constitution limiting state powers, a collection of empty phrases.

> " . . . in truth the [14th] Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the amendment. In other words, the amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs it prohibits, proceeds not merely upon the assumption that states, acting in their governmental capacity, in a complete sense, may do acts which conflict with its provisions, but, also, conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them, and as a result might be used as an instrument for doing wrongs, provided against all and every such possible contingency." Home Telephone and Telegraph Co. v. Los Angeles (1913), 227 U.S. 278, 288.

> "But the [14th] Constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated or state, but upon the persons who are the agents of the State in the

denial of the rights which were intended to be secured."
Ex parte Virginia (1880), 10 Otto 339.

The second basis of the Supreme Court's rationale in denying immunity springs directly from the federal supremacy clause of Article VI of the United States Constitution. That Article declares the U. S. Constitution to be the supreme law of the land. But if a state official can transgress the prohibitions contained in the Constitution and then avoid any judicial consequences of such violation on the grounds that he as a state official is immune from lawsuit, then, manifestly, the acts and will of such state official would be the supreme law of the land, and not the U. S. Constitution. Or, in the words of the Supreme Court:

> ". . . appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.
>
> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the constitution of the United States, would be the supreme law of the land; that the restrictions of the federal constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of

transferring powers of legislation to the governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the federal constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that constitution, the subject is necessarily one for judicial inquiry and appropriate proceeding directed against the individuals charged for the transgression. To such a case federal judicial power extends (Art. III, §2) and, so extending, the court has all the authority appropriate to its exercise."
Sterling v. Constantim (1932), 287 U.S. 378, 397-398.

The holdings of the U. S. Supreme Court squarely and consistently have supported the contentions of the Appellants herein - that state officials are not immune to lawsuits in federal courts, for their individual wrongs. Appellants desire to bring to this Court's attention the many U. S. Supreme Court cases and the explicit language employed by that Court in such cases. However, in order to preserve the continuity of this brief, and mindful of the provisions of Rule 18(e) of this Court, the quotations from the appropriate Supreme Court cases are contained in the Appendix hereto.

D. The Exceptional Privilege Granted to Legislators Is Not Applicable to Other State Officials, Such as Appellees Herein.

Appellees based their immunity arguments in the court below on a single case - Tenney v. Brandhove (1951), 341 U.S. 367. Tenney held that members of a state legislature engaged in "intra-legislative" activities, are privileged, and therefore not amenable to suit for violations of federal statutes. In Tenney the Supreme Court took great care to point out that the holding therein was limited to the facts of that particular case:

> "We have only considered the scope of the privilege as applied to the facts of the present case. As Mr. Justice Miller said in the Kilbourn case: 'It is not necessary to decide here that there may not be things done, in the one house or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible.' 103 U.S. at 204. We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct." 341 U.S. at 378-379.

Also see the concurring opinion of Mr. Justice Black stating:

> "And today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally

liable in a suit brought under the Civil Rights Act."
341 U.S. 379.

In short, Tenney, referring strictly to state legislators engaged in legislative activities, establishes a legislative privilege, not absolute immunity from lawsuit. Indeed, Tenney clearly indicates that there is no absolute immunity even as to state legislators.

But in the case at bench, it is indisputably clear that the Appellees are not even legislators. They are employees or officials of the Department of Public Works of the State of California, a part of the executive branch of California. The Appellees' claims made in the court below, that they exercise "a legislative function" are patently without merit and fly in the face of the provisions of Article III, §1 of the California Constitution which states:

> "The powers of the government of the State of California shall be divided into three separate departments - the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions of pertaining to either of the others, except as in this constitution expressly directed or permitted."

In short, the Appellees are not legislators and can find no comfort in Tenney v. Brandhove.

Moreover, it has been expressly held by the U. S. Court of

Appeals, Seventh Circuit:

"The common law immunity of state legislators for their acts, recognized in Tenney v. Brandhove, 1951, 341 U.S. 367, 378-394, 71 S.Ct. 783, 95 L.Ed. 1019, does not extend to local officials. . . . " Progress Development Co. v. Mitchell (1961), 286 F.2d 222, 231.

E. Federal Courts Have Consistently Upheld The Right to Sue State Officials to Redress Interferences With Economic Rights of Individuals.

The very nature and purpose of 42 U.S.C. §1983 is to provide a broadly applicable method of recourse in federal courts against state officials acting under color of state law.

"If a statute is sufficiently clear to afford a court of equity a basis for inunctive relief it will sustain an action for damages. As we read RS §1979 in the light of the Screws decision we are compelled to the conclusion that Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law." Picking v. Pennsylvania Railroad Co. (1945), 151 F.2d 240, 249.

The breadth of remedies provided by 42 U.S.C. §1983 and the congressional intent to provide such remedies are readily seen

from the discussion of the background of that statute by the U. S. Supreme Court in Monroe v. Pape, 365 U.S. 167, 180:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal court because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the 14th Amendment might be denied by the state agency." (Emphasis added).

Likewise, 60 Northwestern U. L. R. 277, Constitutional Tort: Monroe v. Pape and the Frontiers Beyond, which after reviewing congressional arguments in favor and opposed to the passage of R.S. §1979 (42 U.S.C. §1983), states at page 281:

> "The plentitude of power which it was thought the bill bestowed is perhaps best deduced from the outcries of its opponents. By their complaints, they, in effect, conceded the breadth of the legislation."

and at page 282:

> "It is obvious from the words spoken on both sides that the framers contemplated a bill of great scope. They wished to expand federal jurisdiction significantly as to offenses which generally had been considered 'local' ones."

The leading case establishing the scope of 42 U.S.C. §1983

is Monroe v. Pape, supra. In Monroe, the U. S. Supreme Court carefully reviewed the background, scope and development of applicability of that statute. The net result of Monroe has been to render state employees accountable before the federal judiciary for their wrongs, as federal employees had been theretofore (Bell v. Hood [1946], 327 U.S. 678).

Notwithstanding the fact that Monroe arose in a context of interference by police officers with personal rights, it is obvious that 42 U.S.C. §1983 finds equal applicability in cases where property rights are interfered with. This is only proper and logical, for the Fourteenth Amendment to the U. S. Constitution protects property rights along with life and liberty in its due process clause.

Thus, one finds numerous instances where federal courts have invoked 42 U.S.C. §1983 to protect economic rights of citizens.

In Hornsby v. Allen (1964, C.A. 5th), 326 F.2d 605, the plaintiff brought an action against state officials, charging that she had been arbitrarily denied a liquor license. The U.S. District Court for the Northern District of Georgia dismissed the complaint. The Fifth Circuit Court reversed, holding that state officials are held to federal due process standards in their dealings with individual persons and cannot act arbitrarily to the injury of citizens with whom they deal.

> "The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward

insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse. (Citations)." 326 F. 2d at 610.

In McGuire v. Sadler (1964, C.A. 5th), 337 F. 2d 902, the Circuit Court reversed the dismissal of a complaint by the U. S. District Court for the Western District of Texas, wherein the plaintiff alleged that defendant state land commissioners were attempting, in bad faith, to sell land in which plaintiff claimed title. McGuire held that the plaintiff did state a cause of action. The case is particularly significant because it was decided on contractual theory, and is thus a clear example of federal courts protecting the economic right of individual citizens in an action against state officials.

In Corsican Productions v. Pitchess (1964, C.A. 9th), 338 F. 2d 441, the plaintiff brought action against the sheriff and prosecutors of Los Angeles County seeking to prevent them from interferring with the distribution of plaintiff's motion pictures. After the District Court dismissed the complaint, this Court reversed, indicating that state prosecutors are not immune to lawsuit in federal court by virtue of their status without regard to their conduct. (Likewise see Robichaud v. Ronan [1965, C.A. 9th], 351 F. 2d 533.)

Also in point is Marshal v. Sawyer (1962, C.A. 9th), 301 F. 2d 639, wherein the plaintiff alleged that defendant officials of

the State of Nevada, including the governor thereof, had arbitrarily "black listed" plaintiff and thereby denied him access to the gambling casinos of Nevada on equal terms with other members of the public. This Court held that plaintiff did indeed state a cause of action and was entitled to try his case on the merits in federal court. (Inasmuch as in Sawyer, the Governor of Nevada was one of the defendants, we submit that Sawyer alone effectively disposes of Appellees' argument herein, that they, as state officials, are immune to lawsuit in federal court.)

In Adams v. City of Parkridge (1961, C.A. 7th), 293 F.2d 585, the plaintiffs brought action after being barred by a local ordinance from soliciting funds for a particular charity. The District Court dismissed the complaint, and such dismissal was reversed by the Seventh Circuit. Here again, the federally protected economic rights of plaintiffs were protected by the federal court against interference by local governmental officials.

Also see Sheridan v. Williams (1964, C.A. 9th), 333 F.2d 581, wherein this Court held that a wrongful seizure of the plaintiff's property, and interference with plaintiff's rights in such property, are actionable in federal court.

In summary, the above cases clearly demonstrate that there is no such thing as one formalized, exclusive way of "taking" or "deprivation" of property, for which federal courts will grant relief. The above factual situations and decisions demonstrate that the federal courts properly look to the economic realities of each case and use as their criterion for relief, no doctrinaire

standard, not the fact that title to or possession of a piece of land has been taken by some government entity, but rather the fact that a person's economic interest in his property of whatever kind, has been impaired or destroyed by government officials. Such impairment or destruction is a deprivation within the contemplation of the Constitution. 4/

In the case at bar there have been precisely such wilful and arbitrary interferences with and destruction of Appellants' property rights, warranting relief.

Appellants wish to make it clear to the Court that they do not object (because they cannot) to a taking by eminent domain of Appellants' property by the State of California for a freeway. What Appellants do object to are the acts set forth in the Complaint whereby the Defendants have perverted the process of eminent domain, and used it as a club with which to destroy the Appellants' new shopping center and bully Appellants into submission by leaving Appellants dangling, so to speak, with no further action or attempt to implement the eminent domain taking of Appellants' property as promised and threatened, and without compensation for the havoc wreaked upon Appellants' property.

4/ This, of course, is consistent with the established principle that compensation is to indemnify the property owner:

" . . . the question is, what has the owner lost? not, What has the taker gained?" Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195.

F. State Officials Are Liable in Federal Courts For Abuse of the State's Power of Eminent Domain.

The power of eminent domain is but a single facet of the many governmental activities of a state. The state official who undertakes to engage in activities classified as in the nature of taking of private property for a public use is just as much subject to the proscriptions and limitations of the Federal Constitution as any other state official undertaking to conduct any other activity on behalf of the state. This is so on both reason and authority:

> "Surely eminent domain is no more mystically involved with 'sovereign prerogative' than a state's power to regulate fishing in its waters (citation), its power to regulate intra state trucking rates (citation), a city's power to issue certain bonds without a referendum (citation), its power to license motor vehicles (citation), and a host of other governmental activities carried on by the states and their subdivisions. . . . " Allegheny County v. Frank Mashuda Co. (1959), 360 U.S. 185, 192.

The above words of the U. S. Supreme Court are but a restatement of the well settled rule that:

> " . . . every state power is limited by the inhibitions of the 14th Amendment. (Citations)." Southern Railway Co. v. Virginia (1933), 290 U.S. 190, 196.

"That amendment [14th] governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers.' (Citations)." Mooney v. Holohan (1935), 294 U.S. 103, 113.

Also see N.A.A.C.P. v. Alabama (1958), 357 U.S. 449.

It necessarily follows from the above that a state official who transgresses constitutional limitations and commits a wrong against another in the eminent domain context, is no more of a privileged personage in the eyes of the Federal Courts than any other state official transgressing any other law. It has expressly been so held.

In Progress Development Corp. v. Mitchell (1961), 286 F. 2d 222, it was alleged by plaintiff property owners that a political subdivision of the State of Illinois proceeded to condemn the property owners' land, ostensibly for a park, but in fact to prevent the property owners from building a housing development in which homes were to be sold to persons of all races. The complaint in Mitchell sought injunctive relief and damages reulting from the above abuse of the power of eminent domain by the local officials. After the District Court dismissed the complaint and entered summary judgment for the defendants, the Circuit Court reversed, holding expressly (286 F. 2d at 234) that the property owners in Mitchell were entitled to try their action for damages.

In the case at bench, the District Court sought to distinguish the Mitchell case as follows (RT p. 14, lines 6-10):

"THE COURT: Counsel, I glanced over that case. You have a wholly different problem. You have the problem of trying to prohibit the Negroes from coming in that neighborhood. Of course, any time that issue gets into any case, why, you know what the result will be."

With all due respect to the District Court, Appellants submit that the lower court's view of the Mitchell case is erroneous. Appellants fail to see how the presence of any supposed racial considerations in the Mitchell case can possibly have a bearing on that case's precedential value. Indeed, the Circuit Court in Mitchell expressly rejected the attempts by the parties therein to inject the racial issue into the case (see 286 F. 2d at 234).

It would appear that the District Court herein erroneously injected into the case at bench a theory that the statutes relied on herein (28 U.S.C. §1331, 28 U.S.C. §1343, and 42 U.S.C. §1983) are somehow applicable only to racial minority groups and afford no relief in Federal Courts to other persons. Indeed, the District Court expressly so stated (RT p. 32, lines 2 et seq.). We set forth hereat the colloquy which took place between the District Court and Appellants' counsel, for it plainly demonstrates the unduly narrow view the court below took of the protection afforded by the U. S. Constitution to all persons:

"THE COURT: . . . I don't think this statute that you are relying on here is -- as a matter of fact,

this statute has already been stretched beyond all sanity. Anyone who reads the history of 1980 -- and you are basing yours on statute 1983?

"MR. KANNER: Yes, Your Honor.

"THE COURT: Anyone who reads that, who takes the time to read that, knows it was passed to protect because of race or color. It was passed during reconstruction times. It wasn't passed to cover these things at all. But the court has been broadening and rewriting all along, and I don't think it is up to me.

"MR. KANNER: Your Honor, so was the 14th Amendment.

"THE COURT: As a matter of fact the 14th Amendment was never approved. Did you know that? Never approved.

"MR. KANNER: May I make one statement?

"THE COURT: The Secretary of State, I guess it was, proscribed this proclamation. When it was in effect, both -- two Northern states, New Jersey, as I remember, and the other, Ohio, and one other state, at the first approving withdrew their approval. They did not have the required number of votes to approve the 14th Amendment, so it never actually became effective as a matter of law. But we have a habit, I guess, of skipping over things."

In short, Appellants came into the District Court to obtain protection for their rights secured by the Fourteenth Amendment, but instead of getting relief, were told by the District Court, in effect, that there is no Fourteenth Amendment, and even if there is one it was meant to protect Negroes and no one else.

With all due respect to the District Court such views are not the law. Appellants contend that the Fourteenth Amendment to the United States Constitution was and is effective. Appellants contend that the provisions of the Fourteenth Amendment are an effective restraint on all state actions, and protect all persons, regardless of the color of their skin.

III

THE DISTRICT COURT'S FINDING THAT APPELLEES EXERCISE A DISCRETIONARY FUNCTION IS UNSUPPORTED AND CONTRARY TO UNCONTROVERTED EVIDENCE

Accepting arguendo the Appellees' arguments that State officials acting within the scope of their discretion are immune from suit in Federal Court, no matter what the consequences of their acts, it becomes plain that before one can establish whether or not a particular official enjoys such immunity one must establish whether or not the official acted within his discretion. In other words, at the very threshold of the case one is confronted with the determination of what some writers have termed "jurisdictional facts", namely whether or not the Defendants - as a matter of fact - fall into the group whose immunity they seek.

The above principle was stated as follows by the Court of Appeals in Clackamas County v. McKay (1954), 219 F. 2d 479, 495:

> "Executive officers cannot under such circumstances create an aura of doubt and dispute which will be outside the established power of the judiciary to compel obedience to a clear mandate of the Congress. They cannot by bootstraps manufactured by them lift themselves out of the jurisdiction of the courts."

And the mere fact that a particular defendant official may under some circumstances exercise functions of a highly discretionary nature, does not compel the conclusion that such official's every act is discretionary, nor that the acts complained of in a particular case were within his discretion. The latter point is well illustrated by Udall etc. v. Wisconsin et al. (1962), 306 F. 2d 790, 792-793. The Defendant therein, Mr. Stuart Udall, is the Secretary of the Interior - a member of the President's cabinet, subordinate only to the President of the United States. As such he possesses great discretionary powers. But the question is not whether a defendant has great discretionary powers, but whether he in fact exercised such powers in a particular case. In Udall, the Court of Appeals held that the particular functions of the Secretary of the Interior involved therein, were merely ministerial, and reviewed the acts of the Secretary. Likewise see Parish v. McVeagh (1909), 214 U.S. 124, holding certain acts of the Secretary of the Treasury to be ministerial.

But in the case at bench there has been no determination that the Appellees' acts complained of were in fact discretionary.

In this regard the following colloquy took place in the court below (RT 25, lines 20-25; 26, lines 1-4):

> "MR. KANNER: I contend, Your Honor, that any state official with the recognized exception of legislators and judges, who acts beyond his capacity, even though under color of that capacity, and in so doing does an unconstitutional act, is stripped of his state clothes, so to speak, and he is a mere man standing before a court.
>
> "THE COURT: Well, the trouble with that theory is that in every case there will be a trial as to what is the dividing line, and that is the reason of immunity to keep the public officials from being harassed."

The District Court, in effect, ruled that whenever a state official is served as a defendant he need only come into the District Court and say "I am a state official" and thereby automatically render the Federal judiciary impotent. Such a conclusion is obviously untenable, for it would render constitutional limitations upon the states and much Federal legislation so much idle chatter. What good constitutional pronouncements of principle, what good Federal laws enacted by the Congress, if in the end any state official may violate them all, and merely by virtue of being

a state official prevent any action by Federal Courts to whom is entrusted the administration of Federal law?

Appellants' ultimate, basic contention is that the provisions of the Federal Constitution are not just words on an old parchment exhibited in the National Archives for the indoctrination of visiting school children. The Constitution has a meaning and vitality which express themselves in the spirit as well as in the letter. It is the basic, organic law of this country; it is the supreme law of the land, which cannot be circumvented by any state official, whether acting within his discretion or not. The clear commands and prohibitions of the Constitution cannot be avoided by the kind of legal legerdemain advanced by the Appellees herein.

> " . . . 'what cannot be done directly because of constitutional restriction, cannot be accomplished indirectly. . . . " Macallen Co. v. Massachusetts (1928), 279 U.S. 620, 629.

Not only was there no indication before the District Court of any actual performance of discretionary functions by the Appellees, but in fact there was evidence to the contrary. Attached to Appellants' Motion for New Trial in the District Court, as Exhibit 3 thereto, was an article written by Defendant and Appellee Joseph C. Houghteling, entitled "Confessions of a Highway Commissioner" and subtitled "Being in Account in Which the Rites and Mysteries of the California Highway Commission Are Revealed, With Specific Proposals for Reform". That article, in

its entirety is a part of the record herein.

Appellants therefore, refrain from belaboring its contents with extensive quotations. Suffice it to say that the contents of that article are a clear admission of the part of one of the Appellees herein that as a matter of fact, the California Highway Commission, when adopting condemnation resolutions, does not exercise any discretion, has no means of exercising any discretion nor any kind of a meaningful fact-gathering or investigatory process, and in fact is nothing more than a "rubber stamp" for the California Division of Highways.

And yet, notwithstanding the fact that not a shred of evidence was offered in support of the Appellees' assertions of discretionary act, and notwithstanding the fact that Mr. Houghteling's plain admissions of lack of exercise of discretionary functions were before the court, the District Court based its rulings on the "fact" that the Defendants acted within their discretion. See Reporter's Transcript, pages 34-35:

> "MR. KANNER: . . . May I ask one thing of the court?
>
> "When Your Honor makes the ruling, if Your Honor will be good enough to state the grounds so we will have a record of the present questions.
>
> "THE COURT: I think I pretty well stated it. The ground mainly is that it is based upon the theory that this is a state action but it is within the discretion of a Highway Commission, and as such not subject to review."

It is respectfully submitted that the above ground for the District Court's ruling is totally without support.

Finally, if one were to overlook arguendo that the finding of discretionary acts by the District Court is without foundation, one is still brought face to face with the undisputed and undeniable fact that two of the Defendants, namely Pedley and Erreca, are not members of the Highway Commission and, therefore, even under the District Court's erroneous view are not entitled to immunity.

It is respectfully submitted that even if one were to disregard the twenty-plus U. S. Supreme Court cases rejecting the concept of immunity of state officials, and if one were to accept the immunity argument of the Appellees, as well as the District Court's grounds for finding immunity, one would still have to conclude that no immunity exists as to Pedley and Erreca. Under any circumstances, as to Pedley and Erreca the District Court's ruling was erroneous and should be reversed.

IV

A DEPRIVATION OF PROPERTY RIGHTS HAS OCCURRED IN THE INSTANT CASE

One of the grounds upon which the court below based its order of dismissal, was that the acts alleged in Plaintiffs' complaint do not constitute a taking or damaging of property within the protection afforded by the United States Constitution (see CT 97).

The above finding of the District Court was based on an argument of the Appellees as to what constitutes a "taking" of property. The Appellees have argued that "taking" is synonymous with entry on or physical interference with the land. In other words, Appellees equate "taking" with "disseizin" or "ouster" or "trespass", as opposed to "deprivation" of any property right as "deprivation" is used in the Fourteenth Amendment.

The Appellees' arguments embrace a simplistic view of society which bears no relationship to the realities of today. Implicit in the arguments of Appellees is the image of Farmer Smith who owns Blackacre, and whose property rights are unimpaired as long as corn can be grown on Blackacre.

It is, of course, basic that property is not the land but a right, or more precisely, a group of rights.

> "Property as heretofore defined, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of the particular subject of property. Of these elements the right of user is the most essential and beneficial. Without it all other elements would be of little effect, since if one is deprived of the use of his property, little but a barren title is left in his hands. This right of free and untrammeled user for legitimate purposes is fundamental and within the protection of the Federal Constitution." 42 Am. Jur. 189, Property §4.

"Property consists of the free use, enjoyment, and disposal of a person's acquisition without control or diminution save by the law of the land." Buchanan v. Warley (1917), 245 U.S. 60, 74.

A fortiori, the interference with the right of user deprives the owner of the benefit thereof, and is a "deprivation" within the meaning of the Constitution.

"The constitutional provision is addressed to every sort of interest the citizen may possess." United States v. General Motors (1944), 232 U.S. 373, 378.

"The rule is that an owner cannot be deprived of any of the essential attributes which belong to the right of property which is constitutionally protected are the right to acquire, hold, enjoy, possess, manage, insure, and improve property, and the right to devote property to any legitimate use." 16 Am. Jur. 2d 695, Constitutional Law §366.

"The owner has the constitutional right to make any use of [his property] he desires so long as he does not endanger or threaten the safety, health, and comfort or general welfare of the public. Its enjoyment cannot be interfered with or limited arbitrarily." 16 Am. Jur. 2d 563-564, Constitutional Law §290.

"It is well settled that a taking of property within the meaning of the constitution may be accomplished without formally divesting the owner of his title to the property or of any interest therein. Any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional provision." Nichols on Eminent Domain, Vol. 2, §6.1[1], pp. 367-369.

"Another principle, quite as important and quite as fundamental, is that 'taking' of property within the meaning of the constitution is not restricted to a mere change of physical possession, but includes a permanent or temporary deprivation of the owner of its use. The principle is thus stated by Lewis on Eminent Domain as follows: 'If property then consists not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that when a person is deprived of any of those rights he is to that extent deprived of his property and hence that his property may be taken in the constitutional sense though his title and possession remain undisturbed; and that it may be laid down as a general proposition based upon the nature of property itself that whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or

destroyed by reason of the power of eminent domain, his property is pro tanto taken and he is entitled to compensation.' (2d ed. sec. 56, 3d ed. sec. 65) It is also clear that to take the use of property is to take property within the meaning of the constitution. . . . " Southern Pacific Co. v. Railroad Commission (1939), 13 Cal. 2d 89, 117.

" . . . a law is considered as being a deprivation of property within the meaning of this constitutional guaranty if it deprives owner of one of its essential attributes, destroys its value, restricts or interrupts its common, necessary, or profitable use, hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value. These general principles apply not only to statutes enacted by the legislature but to the action of executive officers generally." Indian Refining Co. v. Ambraw etc. Dist. (1932), 1 F. Supp. 937, 939-940. (Emphasis added).

In the case at bench, the Appellants in February 1965, had a valuable piece of land upon which a major development and construction project was commencing. About two months later, Appellants had the same piece of land with construction begun and stopped (and the attendant scarring of the land), a mountain of bills

and liabilities incurred for the preparation and construction which was now abandoned, and a pile of leases with tenants of the shopping center, which were reduced to worthless scraps of paper.

All of the above happened not because Appellants' property rights somehow vanished, but because of the intervening representations and threats of Pedley, and acts of the other Defendants passing their condemnation resolution which was never implemented nor intended to be implemented.

The unwarranted and fraudulent threats of litigation by Pedley deprived Appellants of the use of their land just as effectively as a physical taking. A private citizen confronted by a state official with an impressive title and superior knowledge, and ordered to stop his activity on pain of lawsuit by the state, is obviously going to obey.

> "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." Bantam Books v. Sullivan (1963), 372 U.S. 58, 68.

The damages are real and described in the complaint. Plaintiffs should be permitted their day in court to offer proof.

CONCLUSION

"December 3, 1627

"It is by my order and for the good of the State that the bearer of this has done what he has done.

Richelieu."

The Court will, no doubt, recognize the above words as the notorious carte blanche of Alexandre Dumas' novel "The Three Musketeers", a document issued in the King's name, which granted to its bearer immunity from legal process, regardless of the misdeeds the bearer may have committed.

While Dumas' work was fiction, the document was all too real. Although Dumas referred to it as a carte blanche, the correct legal term for such papers was lettres de cachet (see Roscoe Pound, The Development of Constitutional Guarantees of Liberty, Yale University Press, p. 24).

In the case at bench, it is clear that what the Appellees really want, is to have this Court bestow upon them by its opinion just such a lettre de cachet. They seek a pronouncement from the Federal Courts that they as state officials, to borrow Richelieu's language, "have done what they have done" and cannot be held accountable for it in a court of law.

Brought into its true perspective, the Appellees' theory is untenable and intolerable.

"The pride and glory of Anglo-American common law have been thought to be the principle that no man is above the law administered by the ordinary courts of the realm, and that 'color of office' consequently creates no immunity for the 'unlawful invasion for another's rights'." 21 Minn. L.R. 263.

The notion that the King was immune arose not from "sovereignty", but from the nature of the feudal system wherein a feudal lord could not be sued in his own courts; the King, being the highest lord was thus above all courts.

As early as 1285, the statute of Westminster II gave a right of action against sheriffs and bailiffs of franchises. The later remedies of bills of exchequer and petitions of right have provided the necessary remedies to the end that British subjects injured by governmental action could secure relief. The modern English view is perhaps best summed up by Dicey, Introduction to the Studies of the Law of the Constitution (7th edition, 1908), page 189:

"In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.

The Reports abound in cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment or to the payment of damages, for acts done in their official character but in excess of their lawful authority."

The above summary of the modern English view closely coincides with American law. See, for example, the U. S. Supreme Court's language in United States v. Lee (1882), 106 U.S. 197, 209:

"Under our system the people who are there [in England] called subjects, are the sovereign. Their rights whether collective or individual, are not bound to give away to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him, for the protection and enforcement of that right."

It should be noted that the old English doctrine of sovereign

immunity was not carried over to this country as to the States. Chisholm v. Georgia (1793), 2 Dall. 419. (Also see 34 Yale L. J. 4.) It was only by the adoption of the Eleventh Amendment to the U. S. Constitution, that states were granted immunity from suit in Federal Courts by a citizen of another state. This immunity was later expanded by judicial decision to also include suits in Federal Courts against the state by the state's own citizen. Hans v. Louisiana (1890), 134 U.S. 1.

But such immunity from suit has only been granted to the states and not to state employees sued for their own wrongs. This has been the rule followed by the U. S. Supreme Court on innumerable occasions, ever since the first impression case of Osborn v. United States Bank (1824), 9 Wheat. 738.

> "But immunity from suit is a high attribute of sovereignty - a prerogative of the state itself - which cannot be availed of by public agents when sued for their own torts. The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they may have injured one of the state's citizens." Hopkins v. Clemson Agricultural College (1910), 221 U.S. 636, 642.

And yet, in the case at bench, the Appellees take the position that these rules of law, representing the profound expression of our political and judicial philosophy, should be cast aside and disregarded. A state official - say the Appellees - must not

even be discommoded to make a defense when it is alleged that he has committed an actionable wrong in violation of the Constitution. His mere status as a state official - according to the Appellees - is enough to create a conclusive presumption that he acted within his discretion, and that he is not subject to any judicial action. The Appellees' arguments would, if accepted, render the U. S. Constitution ineffective and the Federal judiciary impotent. Such arguments should be rejected, and the decision of the court below reversed so as to achieve justice on the merits.

Respectfully submitted,

FADEM, BROWN AND KANNER

By: GIDEON KANNER

Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gideon Kanner

GIDEON KANNER

APPENDIX

This Appendix contains quotations from United States Supreme Court cases rejecting the concept of immunity from lawsuit of state officials sued individually for their wrongs committed under color of their office.

Not quoted herein, but likewise supporting Appellants' position, are the following:

Monroe v. Pape (1961), 365 U. S. 167;

Griffin v. School Board of Prince Edward County (1964), 377 U. S. 218, 228;

Graham v. Folsom (1906), 200 U. S. 248.

". . . The theory of the [14th] Amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the Federal judicial power is competent to afford redress for a wrong by dealing with the officer and the result of his exertion of power."
Home Telephone and Telegraph Co. v. Los Angeles (1913), 227 U. S. 278, 288; 57 L. Ed. 510, 515 (Emphasis added).

"The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief." Sterling v. Constantin (1932), 287 U.S. 378, 393; 77 L. Ed. 375, 382.

"If the conduct of the defendant constitutes an unwarrantable interference with the property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded . . . " Ickes v. Fox (1937), 300 U.S. 82, 97.

"But immunity from suit is a high attribute of sovereignty--a prerogative of the state itself, --which cannot be availed of by public agents when sued for their own torts. The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create

a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how 'can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders. . . whenever they interpose the shield of the state? . . . The whole frame and scheme of the political institutions of this country, state and Federal protest' against extending to any agent the sovereign's exemption from legal process. (Citation)." Hopkins v. Clemson Agricultural College (1910), 221 U. S. 636, 642-643; 55 L. Ed. 890, 894. Cited with approval in Johnson v. Lankford (1917), 245 U. S. 541; 62 L. Ed. 460.

"This distinction [between the state and persons acting on its behalf] is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government based on the sovereignty of the people, from that despotism whether of the one or the many, which enables the agent of the State to declare and decree that he is the State - - to say "L'Etat, c'est moi." Of what avail are

written constitutions, whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated."
Poindexter v. Greenhow (1884), 114 U. S. 270, 29 L. Ed. 185, 193.

"The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the state, they -- though not exempt from suit -- could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. (Citation) But if it appeared

that they proceeded under an unconstitutional statute, their justification failed, and their claim of immunity disappeared on the production of the void statute. Besides, neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application, -- the wrongdoer is treated as a principal, and individually liable for the damages inflicted." Hopkins v. Clemson Agricultural College (1910), 221 U. S. 636, 643; 55 L. Ed. 890, 894 (Emphasis added).

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of government.

In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." Reagan v. Farmers Loan & Trust Co. (1894), 154 U. S. 362, 391; 38 L. Ed. 1014, 1021.

"In the other instances relief was sought under general law from wrongful acts of officials. In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally." Great Northern Life Ins. Co. v. Read (1944), 322 U.S. 47, 51; 88 L. Ed. 1121, 1124.

"When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to a private person under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incidents to her policital sovereignty." Davis v. Gray (1873), 16 Wall 203, 21 L. Ed. 447, 457 (Emphasis added).

" . . . appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.

If this extreme position could be deemed to be well taken, it is manifest that the fiat of a

state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. 3, §2) and, so extending, the court has all the authority appropriate to its exercise." Sterling v. Constantin (1932), 287 U.S. 378, 397-398; 77 L. Ed. 375, 385.

" . . . where the state official, instead of directly interfering with tangible property, is about to commence suits which have for their object the

enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the complainants, he is seeking the same justification from the authority of the state as in other cases. The sovereignty of the state is, in reality, no more involved in one case than in the other. The state cannot, in either case, impart to the official immunity from responsibility to the supreme authority of the United States." Ex parte Young (1908), 209 U. S. 123, 167; 52 L. Ed. 714, 732. (Emphasis added)

"The [railroad] commission was created by the state of Mississippi, under the authority of its Constitution and laws, for the purpose of supervising, and, to some extent, controlling, the acts of the railroads operating within the state. Such a commission is subject to suit by a citizen. (Citations)." Mississippi Railroad Commission v. Illinois Central R. Co. (1906), 203 U. S. 335, 340; 51 L. Ed. 209, 213.

Holding the bank commissioner of Oklahoma liable in damages:

"The present case finds example in Hopkins v. Clemson Agri, College, 221 U. S. 636, 55 L. Ed.

890, 35 L. R. A. (NS) 243, 31 S. Ct. Rep. 654, where the college was held liable for acts of trespass upon private property, and it was said by Mr. Justice Lamar, speaking for the court, that immunity from suit was a 'high attribute of sovereignty -- a prerogative of the state itself -- which cannot be availed of by public agents when sued for their own torts.' " Johnson v. Lankford (1918), 245 U. S. 541, 546; 62 L. Ed. 460, 463.

In an action against Georgia State Revenue Commissioner: "The state is free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers without constitutional authority." Georgia R. & B. Co. v. Redwine (1952), 342 U. S. 299, 305-306; 96 L. Ed. 335, 341.

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property

of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages . . . , is not within the meaning of the Eleventh Amendment an action against the State." Pennoyer v. McConnaughy (1891), 140 U.S. 1, 35 L. Ed. 363, 365; Ex parte Tyler (1893), 149 U.S. 164, 190; 37 L. Ed. 689, 698. (Emphasis added).

In an action against state officials of South Carolina: "The intentional, malicious, and repeated interference by the defendants with the exercise of rights and privileges secured to the plaintiff by the Constitution of the United States, as alleged in the complaint, constitutes, as we think, a wrong and injury not the subject of compensation by mere money standard, but fairly within the doctrine of the cases wherein exemplary damages have been allowed." Scott v. Donald (1897), 165 U.S. 58, 89; 41 L. Ed. 632, 638.

In an action against the attorney general of Nebraska: "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war, -- all of which provisions existed before the adoption of the 11th Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations." Prout v. Starr (1903), 188 U. S. 537, 543; 47 L. Ed. 584, 587.

" . . . The people, through the Constitution of the United States, 'established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States'. In no other way can the supremacy of that Constitution be maintained. It creates a government in fact as well as in name because its Constitution is the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding'; and its authority is enforced by the power to regulate the and govern the conduct of individuals, even where its prohibitions are laid only upon the States themselves. The mandate of the State affords no justification for the invasion of rights secured by the Constitution of the United States; otherwise that Constitution would not be the supreme law of the land." Poindexter v. Greenhow (1884), 114 U. S. 270, 29 L. Ed. 185, 193. (Emphasis added)

". . . in truth the [14th] Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment. In

other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs it prohibits, proceeds not merely upon the assumption that states, acting in their governmental capacity, in a complete sense, may do acts which conflict with its provisions, but, also, conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them, and as a result might be used as an instrument for doing wrongs, provided against all and every such possible contingency." Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 288; 57 L. Ed. 510, 515.

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so make such administration an illegal burden and exaction upon the individual." Greene v. Louisville & I. R. Co. (1917), 244 U.S. 499, 507; 61 L. Ed. 1280, 1285.